Dr Tan Ah Ba v Dr Wong Foot Meow

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22NCVC-206 OF 2011
AMELIA TEE ABDULLAH J
8 NOVEMBER 2011

Tort — Breach of confidence — Confidential information — Claim for damages — Alleged disclosure of dental report without plaintiff's knowledge, consent or approval — Dental report one of causes of settlement amount at much lower figure than that which was originally demanded — Whether defendant's conduct actuated by mala fide — Nature of relationship between plaintiff and defendant — Whether defendant owed duty of confidence to plaintiff — Whether there was quality of confidentiality to information received by defendant

The plaintiff's claim against the defendant was for a declaratory order and damages for the breach of professional duty of confidence and the contract between the parties. The plaintiff's claim stemmed from the issuance and alleged disclosure of the dental report prepared by the defendant to third parties. The plaintiff contended that the said report which was issued in the year 2010 was prepared by the defendant without his express knowledge, consent or approval. Further, the plaintiff contended that the sole purpose for the issuance and disclosure of the report by the defendant was to defeat his claims against Dr How Kim Chuan ('Dr How') for the negligent implant treatment done by Dr How. The plaintiff contended that this amounted to mala fide on the part of the defendant, a breach of the defendant's professional duty of care and confidentiality owed to the plaintiff, and also a breach of contract. The plaintiff claimed a sum of RM1m from the defendant. The basis for asking for this amount is that the defendant had prepared the dental report in the year 2010 merely to defeat the plaintiff's just claims against Dr How. The dental report was alleged to be one of the causes of the settlement amount with Dr How being at a much lower figure than that which was originally demanded against Dr How. The defendant denied any liability for breach of professional duty of confidence to the plaintiff. The defendant contended that the plaintiff's dental report was collected personally by the plaintiff and hereafter the defendant was no longer in control of the said dental report. Further, the defendant contended that after the Malaysian Dental Council ('MDC') had dismissed the plaintiff's complaint on the breach of professional confidence, the plaintiff should have withdrawn this action. Failure to do so and continuing to maintain the present action was a waste of judicial and litigant's time and amounted to an abuse of the process of court.

Held, allowing plaintiff's claim with costs:

(1) The plaintiff's action against the defendant was for breach of duty of

confidence by the defendant for revealing confidential information. Where a professional man like the defendant acquires confidential information from their clients, they are duty bound to keep it confidential (see para 48).

(2) The role of the MDC is different from that of the court. In this case, the MDC considered the ethical conduct of the defendant. It had no jurisdiction to determine any dispute between the plaintiff and the defendant, to determine whether the defendant was in breach of his duty of confidence to his patient and, if so, the amount of damages to be awarded to the plaintiff for such breach. The doctrine of res judicata had no application in this case as the dismissal of the complaint against the defendant by the MDC did not finally determine the rights between the parties. As such, there was no basis in the defendant's contention that the filing of this action in the High Court when the plaintiff's complaint against him was still on going in the MDC, and even when the MDC subsequently dismissed the complaint, amounted to an abuse of the process of court (see paras 55–56).

(3) The plaintiff had succeeded in proving a patient-doctor relationship with the defendant. In the course of his consultation with the defendant, the plaintiff had revealed to the defendant confidential information about the dental work that had been done on him. The defendant would also have drawn his own conclusions and made his own findings as to the state of the plaintiff's oral health, including the nature, extent and seriousness of the plaintiff's pain and suffering. These are confidential matters which the doctor in the relationship owes to the patient to keep confidential (see para 69).

(4) None of the many specialists with whom the plaintiff had consulted had ever alluded to the existence of the impugned report which surfaced for the first time in June 2010. The court was thus unable to accept the defendant's suggestion that it was the plaintiff who had given the report to the specialists with whom he had consultations. Since it was the defendant who had suggested that the report had been handed over by the plaintiff to others, then the defendant should have called the solicitors from Messrs Joseph Ting & Co to enlighten the court and to unravel the puzzle as to where and from whom they had obtained the report. The defendant's failure to do so lends weight to the plaintiff's case (see para 67).

(5) The defendant had indeed issued the dental report on the plaintiff. The report was neither requested by the plaintiff nor was it ever handed over to the plaintiff. The appearance of the report in the hands of Dr How's solicitors just before the trial without any plausible explanation as to how

it came to be there lead the court to the irresistible conclusion that it was the maker of the report who had given it to Messrs Joseph Ting & Co (see para 70).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah untuk perintah deklarasi dan ganti rugi bagi kemungkiran tanggungjawab kerahsiaan profesional dan kontrak antara pihak-pihak. Tuntutan plaintif berbangkit daripada pengeluaran dan dakwaan pendedahan laporan pergigian yang disediakan oleh defendan kepada pihak ketiga. Plaintif menyatakan bahawa laporan tersebut yang dikeluarkan dalam tahun 2010 disediakan oleh defendan tanpa pengetahuan, persetujuan atau kelulusan langsungnya. Selanjutnya, plaintif menyatakan satu-satunya tujuan untuk pengeluaran dan pendedahan laporan oleh defendan adalah untuk menggagalkan tuntutannya terhadap Dr How Kim Chuan ('Dr How') bagi kecuaian rawatan pemasukan (*implant treatment*) yang dilakukan oleh Dr How. Plaintif menyatakan bahawa ini bermaksud mala fide pada pihak defendan, satu kemungkiran kewajipan berjaga-jaga dan kerahsiaan profesional defendan terhadap plaintif, dan juga satu kemungkiran kontrak. Plaintif menuntut sejumlah RM1 juta daripada defendan. Asas bagi permintaan jumlah ini adalah bahawa defendan telah menyediakan laporan pergigian dalam tahun 2010 semata-mata untuk menggagalkan tuntutan adil plaintif terhadap Dr How. Laporan pergigian tersebut didakwa sebagai salah satu sebab jumlah penyelesaian dengan Dr How adalah lebih rendah daripada yang asalnya dituntut terhadap Dr How. Defendan menafikan apa-apa liabiliti bagi kemungkiran kewajipan kerahsiaan profesional kepada plaintif. Defendan menghujahkan bahawa laporan pergigian plaintif diambil secara peribadi oleh plaintif dan selepas itu defendan tidak lagi dalam kawalan laporan pergigian tersebut. Selanjutnya, defendan menghujahkan bahawa selepas Lembaga Pergigian Malaysia ('LPM') menolak aduan plaintif atas kemungkiran kerahsiaan profesional, plaintif sewajarnya menarik balik tindakan ini. Kegagalan berbuat demikian dan berterusan mengekalkan tindakan ini adalah pembaziran masa kehakiman dan litigan dan bermaksud penyalahgunaan proses mahkamah.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Tindakan plaintif terhadap defendan adalah untuk kemungkiran kewajipan profesional kerahsiaan oleh defendan kerana mendedahkan maklumat sulit. Di mana seseorang profesional seperti defendan memperoleh maklumat sulit daripada pesakit-pesakitnya, dia berkewajipan untuk menyimpannya secara sulit (lihat perenggan 48).

(2) Peranan LPM adalah berbeza dengan mahkamah. Dalam kes ini, LPM mempertimbangkan tindakan etika defendan. Ia tiada bidang kuasa untuk menentukan apa-apa pertikaian antara plaintif dan defendan, untuk menentukan sama ada defendan mungkir kewajipan

profesionalnya kepada pesakitnya, dan jika ya, jumlah ganti rugi yang perlu diawardkan kepada plaintif kemungkiran sebegitu. Doktrin res judicata tiada aplikasi dalam kes ini kerana penolakan aduan terhadap defendan oleh LPM tidak menentukan secara muktamad hak-hak antara pihak-pihak. Oleh demikian tidak ada asas dalam hujahan defendan bahawa pemfailan tindakan ini di Mahkamah Tinggi sedangkan aduan plaintif terhadapnya masih dipertimbangkan di LPM, dan walaupun apabila LPM kemudiannya menolak aduan tersebut, bermaksud kepada penyalahgunaan proses mahkamah (lihat perenggan 55–56).

(3) Plaintif berjaya membuktikan hubungan doktor-pesakit dengan defendan. Semasa dalam proses perundingan dengan defendan, plaintif telah mendedahkan kepada defendan maklumat sulit mengenai kerja-kerja pergigian yang telah dilakukan ke atasnya. Defendan juga membuat keputusannya sendiri dan membuat penemuan sendiri berkaitan kesihatan pergigian plaintif, termasuk sifat, peringkat dan keseriusan kesakitan dan penderitaan plaintif. Ini adalah perkara sulit yang doktor dalam hubungan tersebut bertanggungjawab untuk menyimpannya sebagai sulit (lihat perenggan 69).

(4) Tidak ada seorang pun daripada banyak pakar yang plaintif berunding pernah menyentuh tentang kewujudan laporan yang dipersoalkan yang timbul buat pertama kalinya dalam bulan Jun 2010. Mahkamah dengan itu tidak berupaya menerima saranan defendan bahawa ia adalah plaintif yang telah memberikan laporan tersebut kepada pakar yang dengannya dia berunding. Oleh sebab ia adalah defendan yang telah sarankan bahawa laporan tersebut telah diberikan oleh plaintif kepada yang lain, maka defendan sepatutnya memanggil peguamcara dari Tetuan Joseph Ting & Co untuk menjelaskan kepada mahkamah dan menghuraikan kekusutan mengenai dari mana dan daripada siapa mereka mendapatkan laporan tersebut. Kegagalan defendan berbuat demikian memberikan beban yang lebih kepada kes plaintif (lihat perenggan 67).

(5) Defendan sememangnya telah mengeluarkan laporan pergigian kepada plaintif. Laporan tersebut tidak diminta oleh plaintif atau diberikan kepada plaintf. Kewujudan laporan tersebut di tangan peguamcara Dr How sejurus sebelum perbicaraan tanpa apa-apa penjelasan munasabah tentang bagaimana ia wujud membawa mahkamah kepada kesimpulan yang tidak boleh dibantah bahawa ia adalah pembuat laporan tersebut yang telah memberikannya kepada Tetuan Joseph Ting & Co (lihat perenggan 70).]

Notes:

For cases on breach of confidence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 17–21.

Cases referred to

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697 ; [2007] 6 CLJ 93, FC (refd)
Alan Michael Rozario v Merbok MDF Sdn Bhd [2011] 1 CLJ 433, CA (refd)
Dr Chan Choo Lip v Malaysian Medical Council, Ministry of Health Malaysia & Anor [2010] 6 MLJ 574 ; [2010] 8 CLJ 992, HC (refd)
Harry Lee Wee v Law Society of Singapore [1985] 1 MLJ 1; [1984] 1 LNS 77, PC (refd)
Mohamed Yusoff bin Samadi v Attorney General [1975] 1 MLJ 1 (refd)

Legislation referred to

Architect's Act 1967 s 4(e)
Dental Act 1971 s 32(2)(b)
Dental Regulations 1976
Drugs and Cosmetics Regulations 1984
Legal Profession Act 1976
Medical Act 1971
Poisons (Psychotropic Substances) Regulations 1989

Saseedharan Menon (B Muralidharam, JB Fernandez and V Premshangar with him) (Serena Marsh & Associates) for the plaintiff.
Daniel Siew (Lee Kuan Mang & Co) for the defendant.

Amelia Tee Abdullah J:

[1] The plaintiff, Dr Tan Ah Ba, claims against the defendant for declaratory orders to the effect that the defendant, Dr Wong Foot Meow, has breached the professional duty of confidence and the contract between the parties and general, exemplary and punitive damages, interest and costs. The plaintiff's claim stems from the issuance and alleged disclosure of the dental report prepared by the defendant to third parties. The defendant denies any liability for breach of professional duty of confidence to the plaintiff. It is the defendant's case that the plaintiff's dental report was collected personally by the plaintiff and hereafter the defendant was no longer in control of the said dental report.

THE PLAINTIFF'S CASE

[2] The plaintiff, Dr Tan Ah Ba, is a medical practitioner duly registered as a medical doctor with the Malaysian Medical Council. He has been operating a private maternity home known as Clinic Tan Surgery and Maternity since 1972.

[3] Sometime in August/September 2004, the plaintiff had gone to the

defendant's clinic at No 31, Ground Floor, Jalan Medan Tuanku, 50300 Kuala Lumpur to seek consultation and treatment with regard to dental implants which were done on him by a dentist named Dr How Kim Chuan, which implants were causing him much pain and distress. According to the plaintiff:

> The Defendant examined me on the 1st occasion and informed me that he was unable to assist me since the implant procedure had been completed by the said Dentist (Dr. How Kim Chuan).

He initially claimed that thereafter he neither visited nor attended the defendant's clinic to seek treatment nor advice from him.

[4] The plaintiff explained the reason for his visit to the defendant's clinic. He was suffering from severe pain as a result of an implant procedure carried out by Dr How Kim Chuan, practicing under the name and style of How's Orthodontics and Dental Surgery. He wanted the defendant to assist him in resolving the pain and suffering that he was undergoing as a result of Dr How's treatment.

[5] On his first visit, the defendant's nurse had taken an orthopanoramic X-ray ('OPG') of the plaintiff before he entered the consultation room. After carrying out a clinical examination, the plaintiff was informed that the defendant could not assist him because all the implants had already been placed by Dr How. The entire examination and consultation took less than 15 minutes.

[6] As the pain in the plaintiffs mouth was not only re-occurring but getting worse, he visited the defendant's clinic in September 2004 to ask for assistance to be referred to a specialist implantologist either in Malaysia or Singapore. The defendant said that he was unable to assist and handed over the OPG that was taken earlier at the clinic. The plaintiff emphasised that he had never visited the defendant's clinic for consultation or treatment after his second visit in September 2004.

[7] On 29 September 2006, the plaintiff commenced an action against Dr How Kim Chuan in Kuala Lumpur Civil Suit No S2–22–619 of 2006. On 30 June 2010, vide their letter at p 3 of CB 1, Dr How's solicitors served a 'fresh expert report' issued by the defendant on the plaintiff's solicitors. The report was in respect of the examination conducted on the plaintiff by the defendant in August/September 2004.

[8] The fresh expert report, which is the subject matter of this controversy, was dated 9 October 2004 and it sets out details of some of the plaintiff's complaints including private and personal information of his pain and suffering, the examination done on him, and the opinion of the defendant. The

fresh expert report also made various allegedly incorrect and false facts which were disputed by the plaintiff. It is the plaintiff's complaint that he had neither requested for nor consented to the issuance of this fresh expert report by the defendant. The court notes that the fresh expert report was enclosed in a letter dated 30 June 2010 issued by Dr How's solicitors, Messrs Joseph Ting & Co, to Messrs Serena Marsh & Associates (the plaintiff's solicitors) to be included in the common bundle of documents for trial.

[9] On receiving and reading the fresh expert report, the plaintiff immediately notified his solicitors that he had never seen that report prior to 30 June 2010 as he had never requested for the report from the defendant. In any event, the facts stated in the report were also incorrect. On the plaintiff's instructions, his solicitors immediately notified Dr How's solicitors by letter dated 9 July 2010 (p 5 of CB1) as to his objections to the report on the afore-stated reasons.

[10] It is the basis of the plaintiff's case that he had never requested for nor consented to the issuance of the report and that the said report was prepared by the defendant without his express knowledge, consent or approval. Further, the defendant had never informed the plaintiff that he had prepared this report nor had he obtained the plaintiff's consent before releasing the said report. The plaintiff verily believed that the sole purpose for the issuance and disclosure of the report by the defendant, and only in the year 2010, was to defeat his just claims against Dr How. He contends that this amounted to mala fide on the part of the defendant, to breach of the defendant's professional duty of care and confidentiality owed to the plaintiff, and also to breach of contract.

[11] Vide a letter of demand dated 31 January 2011 (pp 7–8 of CB1) issued by the plaintiff's solicitors, the defendant was notified that his act in preparing, releasing and disclosing the report in respect of an examination conducted on the plaintiff to third parties amounted to breach of the defendant's professional duty as well as breach of the contract between the parties. The identity of the third party was not revealed in the letter of demand. The plaintiff's solicitors also demanded that the defendant refrained from further distributing the report. By letter dated 9 February 2011, the defendant replied that the plaintiff had requested for the report. In light of this response, the plaintiff immediately instructed his solicitors to commence legal action against the defendant. The identity of the third party to whom the defendant was alleged to have revealed the report was also not stated in the statement of claim.

[12] The plaintiff agreed that nowhere in his examination-in-chief, including his witness statement, had he revealed the identity of the third party to whom the defendant was alleged to have revealed the dental report. It was only during cross-examination that the plaintiff first revealed that the third

party is Dr How and his solicitors, Messrs Joseph Ting & Co. The plaintiff claimed that that he had proof by way of letter that the dental report was passed by the defendant to Dr How and his solicitors, Messrs Joseph Ting & Co. Initially, he admitted that the letter was not in any of the bundles before the court. However, he had later pointed to Messrs Joseph Ting & Co's letter at p 3 of CB 1 as his proof.

[13] Reference was made by the plaintiff to various dental reports obtained by him from other dentists from Malaysia, Singapore and London. The purpose of these reports was to determine the extent of the damage caused as a result of the negligent implant treatment done by Dr How and the remedial measures that could be taken to rectify the damage to his nerve. The reports were made at the request of the Malaysian Dental Council who was conducting disciplinary proceedings against Dr How, at the request of a High Court judge to determine the actual extent of the damage and the possible cost involved in rectifying the damage, and by the plaintiffs treating dentist, Dr Nethi. In summary, the reports were as follows:

(a) report of Dr Myra Elliot dated 18 June 2005 (at pp 13–15). Dr Myra was referred by Dr Nethi;

(b) report of Dr David KL Tay from MD Specialist Healthcare dated 29 July 2005 (at pp 16–20). Dr Tay was also referred by Dr Nethi;

(c) report of Professor Dr Ong Siew Tin from the Faculty of Dentistry, University of Malaya dated 3 October 2005 (at pp 24–25). She was referred by the Malaysian Dental Council;

(d) report of Dr Michael Ong Ah Hup from the Faculty of Dentistry, University of Malaya dated 8 August 2006 (at pp 26–30). Dr Michael Ong was referred by Skrine & Co;

(e) report of Dr Nethi Ganantarajah from Nethi Dental Specialist Clinic, Tawakal Hospital dated 12 February 2007 (at pp 32–33);

(f) report of Prof Dr Phabhakaran KN Nambiar from the Faculty of Dentistry, University of Malaya dated 15 June 2009 (at p 41). He was referred by the High Court; and

(g) report of Mr Ian Downie dated 16 September 2010 (at pp 42–43, 44–47). He was also referred by the High Court.

[14] The plaintiff agreed that whenever his treating doctor referred him, there was a report. However, he disagreed that when he met the defendant, he had asked for a report. He disagreed that after consultation with the defendant on 21 August 2004 and 7 September 2004, he had gone to the defendant's office on 9 October 2004 to collect the dental report. He further disagreed that

he had possession of the dental report prepared by the defendant ever since 9 October 2004 and had forwarded a copy to all the specialists who had prepared dental reports for him.

[15] In the course of the hearing, the plaintiff had sought to introduce a letter dated 15 December 2010 from his solicitors to Dr How's solicitors to inform that he was not agreeable to Dr How's request for the withdrawal of the plaintiff's complaint lodged with the Malaysian Dental Council. In light of this evidence, reference was made obliquely to Dr How's solicitors' letter dated 13 December 2010. The admissibility of this letter was objected to by learned counsel for the defendant on the basis that it is a response to a 'without prejudice' letter and also that it was produced at a very late stage. After hearing submissions from both sides, the court had on 22 August 2011 ruled that the 15 December 2010 letter was inadmissible.

[16] The plaintiff claimed a sum of RM1m from the defendant. The basis for asking for this amount is that the defendant had prepared the dental report in the year 2010 merely to defeat the plaintiffs just claims against Dr How. The dental report was alleged to be one of the causes of the settlement amount with Dr How being at a much lower figure than that which was originally demanded against Dr How.

[17] The plaintiff does not deny that he had lodged a complaint against the defendant dated 12 July 2010 with the Malaysian Dental Council asking the council to investigate whether the defendant had acted ethically in preparing a dental report about him and furnishing it to a third party without his knowledge and consent. As a result of the plaintiff's complaint, the defendant was charged with misconduct under s 32(2)(b) of the Dental Act 1971. He agreed that when he filed the present writ against the defendant on 14 March 2011, the inquiry against the defendant was still ongoing. He agreed that he had filed a similar case in the High Court when his original case at the Malaysian Dental Council was still ongoing.

[18] The plaintiff does not dispute that the Malaysian Dental Council ('MDC') had dismissed his complaint. He agrees that this court is not a court of judicial review of the MDC decision. He denied that his action in court is malicious and an abuse of court since he had already lodged a complaint to the MDC on the same matter and the complaint had already been dismissed by the MDC. He offered the explanation that he was maintaining his claim against the defendant because his claim deals with breach of professional duties and contract whereas the matter in the MDC was a case of breach of ethics.

[19] The plaintiff agrees that his suit against Dr How Kim Chuan was settled out of court. Consent judgment was recorded on 23 December 2010. He told

the court that he had received RM800,000. He disagreed with the suggestion by counsel for the defendant that since consent judgment was entered into without admission of liability, the dental report of the defendant had played no part in defeating his claim. According to him, his initial claim was for RM5m but because of the defendant's report, he was forced to accept a much smaller figure.

[20] The plaintiff called his son, Dr Alex Tan Kwan Kit ('PW2') in support of his case. In 2004, PW2 was then undergoing a medical course in the University of Birmingham. He was back in Malaysia in August 2004 and left on 23 September 2004. He testified that he was aware of the plaintiff's dental implant treatment with Dr How Kim Chuan. He was aware that his father had undergone severe pain and suffering during and after the failed implant treatment. The plaintiff had called him often to complain about his pain and suffering. The plaintiff had also visited PW2 in the United Kingdom during his implant treatment and was suffering severe pain during the visit.

[21] PW2 also testified that he was aware of the plaintiff's visits to the defendant. He testified that the plaintiff had visited the defendant on two occasions to seek a solution and remedy for his pain and suffering. He had driven his father to the defendant's clinic on both occasions and claimed to be present in the consultation room when the defendant was examining and advising the plaintiff.

[22] Questions were put to PW2 about his recollection of the defendant's clinic. He described the clinic as being located on the ground floor. There is a waiting room as you enter and with separate consultation rooms for the dentists. He was however uncertain as to how many dentist's chairs there were in the consultation room. He claimed that on both occasions, he was standing throughout the plaintiff's consultation with the defendant and was not offered a seat. He denied that he had not accompanied the plaintiff as his evidence that he was standing throughout the consultation was incredible.

[23] PW2 testified that the plaintiff had not, during either visit, requested for a report from the defendant. He reiterated that the main purpose of going to the defendant's clinic was to seek for a solution and an end to the plaintiff's pain and suffering. He confirmed that the defendant had expressly informed the plaintiff that he could not do anything to assist him and was unable to identify the actual cause for the pain. He refused to conduct any treatment on the plaintiff or to suggest any possible remedy. When the plaintiff requested for assistance to be referred to a specialist implantologist in Malaysia or Singapore, the defendant's response was that he was unable to assist and had merely

handed over the OPG that had been taken earlier in his clinic.

THE DEFENDANT'S CASE

[24] The defendant, Dr Wong Foot Meow ('DW1'), is a consultant oral maxillofacial surgeon specialising in oral surgery and dental implantology. He claims to be a well known dental consultant and well sought after for his expert opinion in implants, especially in the areas of writing reports and the formulation of treatment. He is often sought by lawyers and patients for second opinions and status reports.

[25] The defendant testified that the plaintiff had called him personally to make an appointment. They had met on a few occasions. At the first consultation on 21 August 2004 at between 12 noon to 12.45pm, an examination was conducted and model impressions and a panorex X-ray were conducted. On the second occasion on 7 September 2004 at 12.15 to 12.45, there was an evaluation of the findings, a discussion on the clinical findings, treatment plan, costing and provision of report. The defendant denied that he did not treat the plaintiff on 7 September 2004 but claimed that he did full mouth checking and checked the pocketing. He claimed that this is considered as a treatment. On both these occasions, the plaintiff was alone. The plaintiff personally collected the dental report sometime in October 2011. The defendant referred the court to his clinic log book and explained that when patients came in, his nurse would write down the number, name, age, registration number and the amount collected in the log book. Pages 36a and 36b of CB 1 would show the entries on 21 August 2004 and 7 September 2004 where the plaintiff's name appears as one of the defendant's patients on each of those two dates.

[26] During the first consultation on 21 August 2004, the plaintiff had described in detail about the dental treatment he had undergone with another specialist. The treatment was a total oral rehabilitation involving multiple dental implants. According to the defendant, the plaintiff had wanted a full report of his current condition, the long term prognosis of the dental work done, a new oral rehabilitation treatment plan, the costing, time frame as well as the mechanics of the treatment. What the defendant had done on the first visit was standard operating procedure which included a thorough oral and general examination, dental charting, upper and lower impressions plus wafer bite for study models and panorex X-rays. There were discussions about specific oral hygiene instructions and the plaintiff was given a chlorhexidine mouth wash. Most of the standard tests were done but further visits were required to evaluate the plaintiff's oral hygiene status and discussions on findings, report and treatment plan.

[27] During the second consultation on 7 September 2004, the defendant saw no improvement in the plaintiff's oral hygiene status and thus he proceeded to discuss treatment plan and costing. The plaintiff was informed of the clinical findings. There was a full discussion of the treatment plan as well as the implications of the choices and costing. However, the plaintiff wanted a detailed report and time to consider his options as the costing quoted to him were high. The defendant had told the plaintiff that once he understood the treatment plan and the costs involved, he could then decide on his own free will and in his own best interest what he wanted to do next.

[28] According to the defendant, the plaintiff had asked him to prepare a dental report for use in his case or complaint against the doctor who had provided him with the dental treatment. Whilst the defendant agreed to prepare the dental report, he however required time to do so as he had to correlate the clinical findings, the location of the implants already in situ, the long term prognosis and the patient's willingness to undergo another major oral rehabilitation. As a responsible clinician, he told the plaintiff that the contents of the dental report would have to reflect the actual clinical findings and whether the dental report could actually be used against the doctor who provided him with the dental treatment would be a secondary matter.

[29] The defendant testified that he took approximately two weeks to prepare the dental report and that the plaintiff collected it personally from him sometime in October 2004. He claimed that the date must have been 9 October 2004 because he had written the date '9/10/04' on the report when the plaintiff collected it (pp 1 & 2 of CB1). He denied that the report was never given to the plaintiff but offered the information that it was given on 9 October 2004 at around lunchtime. He agreed that there were no documents to show that the plaintiff had attended at his office on 9 October 2004 to collect the report. He offered the explaination that it was their practice to just hand over a report without an acknowledgement. He claimed that the plaintiff did not pay for the report and that if there was no payment, they would not record his attendance. When referred to entries with the words 'N/C', he explained that they might have paid the day before and there was no charge on that day. The court notes that at p 36b, the plaintiff's attendance was recorded although he was not charged. The defendant explained that he did not charge the plaintiff for the second visit or the dental report because there is such a thing as medical professional courtesy. For implants, they would give a discount. The RM25 paid on 21 August 2004 was for the cost of the X-ray and not professional fees. During re-examination, the defendant explained further that the clinic nurse would only enter into the ledger those patients who 'enter the dental surgery and actually sit in the dental chair'. He was insistent that all patients who collect reports are not entered into the ledger.

[30] The defendant maintained that the plaintiff had asked for a detailed report to lodge a complaint. He agreed that lodging a report was a serious matter and that if a complaint was lodged based on his report, he would be called as a witness. He agreed that it would have been prudent to obtain an acknowledgment of receipt for the report that was handed over to the plaintiff.

[31] As at 21 August 2004, the defendant's finding was that there was nothing wrong with the implant. The treatment plan discussed with the plaintiff was to redo the six front teeth, to see an ENT surgeon for the pain in the upper right jaw and also to have good oral hygiene. The plaintiff had wanted to improve his appearance as the six front teeth were bulbous. He explained that a 'coping' is an attachment affixed onto an implant and that once a coping is put in, it would be necessary to refix the crown and bridge.

[32] The defendant contends that once the report had been passed to the plaintiff, he would no longer have control since possession of the dental report would have been in the custody of the plaintiff. Furthermore, since the plaintiff had not committed to the proposed treatment plan, the defendant would have no further interest and would have closed the file accordingly. The plaintiff's file had been closed ever since his last visit to collect his dental report.

[33] The defendant claimed that he had no knowledge of the plaintiff's case against Dr How Kim Chuan in Kuala Lumpur High Court case Suit No S-22–619 of 2006. He only came to know about it when solicitors for the plaintiff issued him with a letter of demand dated 31 January 2011. The defendant suggests that the plaintiff's series of consultations with other specialists right after the defendant's report on his medical condition shows that the defendant would have been no exception and that the plaintiff would have requested a dental report from him as well. The defendant states that he is just one of the many doctors that the plaintiff consulted and sought preparation of a dental report, the only difference being that the defendant's medical opinion was not favourable to the plaintiff's case against Dr How Kim Chuan.

[34] The defendant was asked whether he had any idea whether the plaintiff had furnished the dental report to other specialists. It is the defendant's evidence that by convention and dento-medical protocol, the moment a fresh specialist is consulted for a second or subsequent opinion, they will definitely request for previous reports to correlate their findings and to ensure that they have not left out salient features unique to any particular case. Doctors would request for a previous report as it is a basic professional duty to refer to an earlier prepared medical diagnosis and also a courtesy to ensure that the patient will not waste extra expenses and time on replication of tests already done. Thus logically and by extrapolation, the defendant's report would have been

provided by him to any specialist who requested for an earlier medical report. The court notes that whilst saying that it is the practice of specialists to correlate their reports with previous reports, the defendant admitted that when he had prepared the plaintiff's report, he did not know who had treated the plaintiff earlier and that he did not ask. He agreed that none of the other specialists' reports had referred to his report. He further agreed that there were material differences between his report and some of the other reports. His report was also not addressed to anyone whereas the reports of all the other specialists were addressed to someone. He claimed that in all his years of practice, he had not addressed his reports to anyone. He also agreed that whereas most of the other reports provided a detailed treatment plan, his report did not have such a plan. He denied that his report was created specially to suit the defence of Dr How or that he had relayed the report to Dr How or to Messrs Joseph Ting & Co.

[35] Since the defendant's dental report could have been given by the plaintiff to all the specialists for their references, the defendant would have no power to control the circulation of the said dental report from falling into wrong hands. He emphatically stated that he had never furnished the dental report to anybody other than the plaintiff and that there was no reason for him to reveal the said report to Dr How Kim Chuan or Messrs Joseph Ting as he had no interest in the matter.

[36] As regards the letter of demand issued by plaintiff's solicitors against him for breach of patient confidentiality and RM1m as damages, vide a letter dated 9 February 2011 (pp 10 & 11 of CB1) the defendant had written to the plaintiff's solicitors denying any breach of his professional duties through furnishing the dental report to third parties. He testified that he regarded the patient's solicitors as a third party although not the plaintiff. He stated that the plaintiff himself had access to the said dental report and it was beyond his control if the plaintiff disseminated the report to everyone.

[37] Apart from the current suit in the High Court, the plaintiff had earlier lodged a similar complaint on the defendant's 'breach of professional duty of confident' to the Malaysian Dental Council ('MDC') under the Dental Act 1971 and Dental Regulations 1976. The plaintiff had submitted to the jurisdiction of the Preliminary Investigation Committee ('PIC') of the MDC to decide on whether the defendant had breached the professional duty of confidence by issuing and circulating the said dental report. The PIC had recommended to the MDC that there was no basis in the plaintiff's complaint and that no further action be taken by the MDC. The MDC had then dismissed the plaintiff's complaint against the defendant.

[38] On the consent judgement recorded by Dr Tan Ah Ba and Dr How Kim Chuan (pp 142–144 of CB1), the defendant was advised by his solicitors that

the said consent judgement had clearly shown that the plaintiff did not suffer any damages at all even if there is a 'breach of duty of confident'. In fact in that case, the plaintiff had agreed that there was no liability on the part of Dr How Kim Chuan and he had agreed to accept a settlement from Dr How Kim Chuan.

[39] As regards the position of Messrs Joseph Ting & Co, the defendant denied that Messrs Joseph Ting & Co were his previous solicitors. He claimed to have no previous solicitors. He was referred to p 28 of the original bundle of documents ('encl 8') and confirmed that it was a notice of change of solicitors from Messrs Joseph Ting & Co to his present solicitors. When asked how he came to know that Messrs Joseph Ting & Co had entered appearance for him, he explained that he was informed so by DPL. He had changed solicitors because otherwise there would be a penalty on the insurance premium. His present solicitors had taken over from Messrs Joseph Ting & Co. The defendant testified that he was not aware that Messrs Joseph Ting & Co were also the solicitors for Dr How. He further denied that he and Dr How had common lawyers because he had never engaged Messrs Joseph Ting & Co and that it was DPL which had engaged them.

[40] The defendant had explained that dentists in Malaysia are covered for dental insurance by Dental Protection Limited of London ('DPL'). When he received the letter from MDC in July 2010, he immediately informed DPL about what had transpired. He was of the belief that Messrs Joseph Ting & Co is one of the counsels on the panel of DPL and that they had filed an appearance for him without his knowledge. When he found out later, he had immediately asked for a change of lawyers.

[41] The defendant admitted that DPL had verbally sounded him about two years earlier about becoming an expert witness but he had not agreed. He did not call the plaintiff to inform him that he had been approached although he agreed that as a professional doctor, he should have called the plaintiff to inform him about what had transpired. He claimed not to know about the claim filed by the plaintiff against Dr How because when he was approached by DPL, he was not told the name of the doctor or patient involved. DPL's call to act as an expert was only in general terms.

[42] The defendant agreed that his report was not favourable to the plaintiff's case against Dr How. He further agreed that since the report was not favourable to the plaintiff, he (the plaintiff) would not have given the report to anybody. He agreed that he had a dentist-patient relationship with the plaintiff and that he was bound to maintain confidentiality of patient particulars. He

agreed that the plaintiff had revealed confidential matters to him. With regard to the release of the report, the court recorded the following exchange:

Q: As a professional dentist, you did not get the plaintiffs consent before you released the report to Messrs Joseph Ting & Co.

A: I received the consent from the patient but I did not release the report to anyone.

EVALUATION AND FINDINGS

[43] In coming to a decision in this case, the court has carefully weighed the evidence adduced by both parties. The court has scrutinised the documents tendered and relied on by the parties and considered the written submissions filed by them.

[44] As a preliminary issue, the court has considered the defendant's argument that this suit filed by the plaintiff is an abuse of court process. Learned counsel for the defendant has argued that following the plaintiff's complaint to MDC that the defendant had breached professional confidence, MDC had commenced disciplinary proceedings against the defendant. However, whilst the MDC proceedings were on-going, the plaintiff had commenced this present action against the defendant on 14 March 2011. The defendant thus submits that this civil suit is, from its inception, an abuse of court process since the plaintiff had already referred the same complaint to MDC.

[45] The defendant concedes that the plaintiff may well argue that it has a right to file this suit in the High Court as its earlier complaint was to MDC, a statutory disciplinary body. The defendant contends that the plaintiff can only continue to maintain the High Court action on a complaint of breach of professional confidence in two situations, namely:

(a) the High Court decides on the complaint before the MDC; and

(b) the plaintiff has referred the same complaint to the MDC and the MDC has decided in the plaintiff's favour. Since MDC can only punish its members for disciplinary matters, the High Court will then be able to decide on the issue of damages suffered by the plaintiff for the said breach. However, since the MDC here has already decided that there is no breach of professional confidence, the defendant argues that it is an abuse of process for the plaintiff to continue to maintain this action.

[46] It is the defendant's contention that after the MDC has dismissed the plaintiffs complaint, the plaintiff should have withdrawn this action. Failure to do so and continuing to maintain the present action was a waste of judicial and litigant's time and amounted to an abuse of the process of court.

[47] The plaintiff, on the other hand, has pointed out that the plaintiff's complaint to the MDC was with regard to the ethical conduct of the defendant, namely whether the defendant had breached the Malaysian Dental Council's Code of Professional Conduct. Disciplinary proceedings are conducted to determine whether a dental practitioner has acted in a manner which is regarded as disgraceful or dishonourable by his professional brethren of good repute. The punishment which the MDC can mete out is a reprimand, fine, suspension or striking off from the register.

[48] On the other hand, the plaintiff's action in this court is whether the defendant had breached his duty of confidence as a doctor to the plaintiff by revealing confidential information. Where a professional man like the defendant acquires confidential information from their clients, they are duty bound to keep it confidential. As stated by AM Dugdate and KM Stanton in the book 'Professional Negligence':

> The client whose confidence has been broken may be entitled to an injunction and damages.

[49] The plaintiff's claim in the High Court is for declaratory orders and damages for the breach. As pointed out by learned counsel for the plaintiff, these orders sought by the plaintiff cannot be granted by the MDC.

[50] The court agrees with the various authorities cited by the plaintiff in support of its arguments on this issue. In the case of *Alan Michael Rozario v Merbok MDF Sdn Bhd* [2011] 1 CLJ 433, the Court of Appeal had held that the second defendant's civil liability to the plaintiff is distinct and separate from any criminal consequences or disciplinary action under the Legal Profession Act 1976. Even clearer is the case of *Dr Chan Choo Lip v Malaysian Medical Council, Ministry of Health Malaysia & Anor* [2010] 6 MLJ 574 ; [2010] 8 CLJ 992. In that case, the applicant who was a practising doctor and a member of the Malaysian Medical Council ('MMC') had been charged with 33 counts of offences under the Poisons (Psychotropic Substances) Regulations 1989 and the Drugs and Cosmetic Regulations 1984. He was subsequently acquitted. Notwithstanding the acquittal, the MMC sought to institute an inquiry against the applicant pursuant to its powers under the Medical Act 1971. The applicant argued that the inquiry, considering his acquittal and the authorities (which included the case of *Harry Lee Wee v Law Society of Singapore* [1985] 1 MLJ 1; [1984] 1 LNS 77(PC) relied on by the defendant) was an abuse of process and of the council's powers.

[51] In dismissing the application, the High Court distinguished the case *Harry Lee Wee* as a decision concerning double disciplinary proceedings instituted against the appellant and held as follows:

The Medical Act is designed to regulate the conduct and practice of its members. The medical profession being a professional body is required to maintain a high standard of practice, ethics and discipline for the protection of the public that it serves. The Medical Council is therefore entitled to enforce the rules regulating the conduct and practice of its members in the interest of not just its members but the public as well. Thus, the acquittal or conviction of any of its members in the court of law for criminal offences should not, given their supervisory and regulatory task, be binding on the council.

[52] Another case that was brought to the attention of the court is that of *Mohamed Yusoff bin Samadi v Attorney General* [1975] 1 MLJ 1. The plaintiff, who was a school teacher, had been charged on five charges of using criminal force on four girls in his class to outrage their modesty. He was acquitted on those charges. Subsequently, the Public Services Commission ('PSC') instituted disciplinary proceedings against him with a view to his dismissal. He was charged with five charges that he had abused his position as a teacher by outraging the modesty of the same four pupils. The plaintiff applied for a declaration, inter alia, that the determination in the magistrate's court was a conclusive acquittal and discharge which constituted issue estoppel or res judicata, thus making it improper for the PSC to proceed on the same charges. In that case, the court held that there was no principle of law which precludes a man who has been acquitted or convicted upon a set of facts alleged to constitute an offence from being subsequently subjected upon the same facts to disciplinary action by a domestic tribunal. Thus the court held that it was not improper for the PSC to institute disciplinary proceedings in that case since the exercise by the PSC of its powers is not by way of punishment but rather to enforce a high standard of propriety and professional conduct. As such, the court found that there was no res judicata as the parties were different and the facts were relevant to the accusation of a different character, namely, misconduct.

[53] Reference was also made to the case of *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697; [2007] 6 CLJ 93 where the Federal Court had to consider whether the Lembaga Arkitek Malaysia ('LAM') was competent to decide on the lawfulness or otherwise of the termination of an architect by his client. The Federal Court held that res judicata applies only in respect of a matter over which the court has pronounced a judgment. In that case, LAM's decision was upheld by the Supreme Court pursuant to a proceeding for judicial review. The Federal Court said that it was settled law that judicial review is concerned with the decision making process and not with the decision itself. As such, LAM's decision did not constitute res judicata by virtue of being a decision of the Supreme Court.

[54] The Federal Court also went on to hold that the test to be applied in

A determining whether the decision of a tribunal, which is not a court, is capable of constituting res judicata is whether it has jurisdiction to decide finally a question arising between the parties. From a reading of s 4(e) of the Architect's Act 1967, LAM is only empowered to hear and determine disputes relating to professional misconduct and has no power to hear disputes between an B architect and his client. Since the dispute in that case was in relation to an agreement between an architect and his client with regard to services rendered, it followed there from that LAM had no jurisdiction to entertain the dispute.

C **[55]** In light of the many authorities as set out above, the court is satisfied that the role of the role of the MDC is different from that of the court. In this case, the MDC was considering the ethical conduct of the defendant. It had no jurisdiction to determine any dispute between the plaintiff and the defendant, to determine whether the defendant was in breach of his duty of confidence to D his patient and, if so, the amount of damages to be awarded to the plaintiff for such breach. The court is satisfied that res judicata has no application in this case as the dismissal of the complaint against the defendant by the MDC does not finally determine the rights between the parties.

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[56] As such, the court finds that the there is no basis in the defendant's contention that the filing of this action in the High Court when the plaintiff's complaint against him was still on going in the MDC, and even when the MDC subsequently dismissed the complaint, amounted to an abuse of the F process of court.

[57] There is no dispute that the plaintiff went to the defendant's clinic for consultation and treatment in relation to his dental implants which were causing him severe pain and distress. The court has no hesitation in finding that G there were visits on 21 August 2004 and 7 September 2004 as these visits were clearly recorded in the defendant clinic log book at pp 36a and 36b. However, what is in dispute is whether the plaintiff had requested for a report in order to lodge a complaint against Dr How who had performed the plaintiff's H problematic implants and whether the impugned dental report had been prepared and handed over to the plaintiff.

[58] The plaintiff denies that he had asked the defendant for a dental report. Whilst he had wanted the defendant to assist him to resolve his pain and I suffering, the defendant had told him on his very first visit on 21 August 2004 that he could not assist him as all the implants had already been placed by Dr How. On his second visit on 7 september 2004, the plaintiff had requested for assistance to be referred to a specialist implantologist in Malaysia or Singapore. Again the defendant told him that he could not assist and had only handed him

the OPG that was taken on the first visit. Thereafter he had never visited the defendant's clinic again, had never asked for a dental report and had certainly never collected any such report.

[59] As such, the plaintiff was astonished when, in the course of proceedings in his civil suit against Dr How, he was served with a 'fresh expert report' by Dr How's solicitor. The report, bearing the date '9/10/04' was enclosed together a letter dated 30 June 2010 from Messrs Joseph Ting & Co together with a request to indicate whether the said report was to be placed in Part A, B or C. The court notes that the plaintiff's reply was immediate. Vide a letter dated 9 July 2010, Messrs Serena Marsh & Associates for the plaintiff informed Messrs Joseph Ting & Co that 'our client has never seen this report before'.

[60] It is the defendant's case that the plaintiff had asked him to prepare a dental report for use in his case or complaint against the doctor who provided him with the dental treatment. He claimed that he took approximately two weeks to prepare the report as he had to correlate the clinical findings, the location of the implants already in situ, the long term prognosis and the patient's willingness to undergo another major oral rehabilitation. He claimed that the contents of his report reflected actual clinical findings and whether or not the report could be used against the doctor who provided the treatment was a secondary matter. It is his evidence that the plaintiff personally collected the report on 9 October 2004 at around lunchtime because he had written the said date on the report when the plaintiff collected it.

[61] In light of these conflicting versions, the question that arises for determination by the court is whether the plaintiff requested for a report and whether the report was handed over to the plaintiff on 9 October 2004. A secondary issue to be considered is how the report had come to be in the possession of Messrs Joseph Ting & Co.

[62] Upon a careful consideration of the evidence adduced on this issue, the court finds that the plaintiff has succeeded in proving on a balance of probabilities that the said report was never handed over to him on 9 October 2004. The reasons for arriving at this conclusion can be summarised below.

[63] Evidence has been led to show that the defendant's clinic nurse maintained a clinic log book into which is entered the date of the visit, the name of the patient, the registration number and the amount charged. Whilst extracts from the log book for the dates 21 August 2004 and 7 September 2004 were exhibited to show the attendance of the plaintiff at the defendant's clinic on those dates, the extract for 9 October 2004 was not produced. By its absence, the court is constrained to find that the extract for 9 October 2004, if produced, would not have bore the name of the plaintiff as one of the patients

who visited the defendant's clinic on that day. On this score, the court finds the defendant's explanation during re-examination that the clinic nurse would only enter into the ledger those patients who 'enter the dental surgery and actually sit in the dental chair' to be less than convincing.

[64] The court notes the absence of an acknowledgement receipt for the dental report. It is true that the defendant had testified that it is their practice to just hand over a report without an acknowledgement. In light of his evidence that the report was sought by the plaintiff for use in lodging a complaint against the dentist who performed the implants as well as his agreement that it would be prudent to obtain an acknowledgement receipt for the report lodged, the court finds that the absence of an acknowledgement of the report gives rise to serious questions and doubts as to whether the report was handed over to the plaintiff or at all.

[65] The court has also considered the fact that the impugned report surfaced for the first time in June 2010. The court has dwelled on this question: Why should a report, unfavourable to the plaintiff, find its way into the hands of the defendant's solicitors, and surface for the first time when the parties are collating documents to be placed in the relevant bundles in readiness for trial? The defendant has suggested that after the report was handed over to the plaintiff, the plaintiff would have possession of it and that it could thus have been given by him to anyone, including the many specialists with whom he had consulted.

[66] The court has carefully considered this scenario but has no hesitation in rejecting it for the simple reason that since the report was not favourable to him, the plaintiff would have derived absolutely no benefit in disclosing it. In any event, the court notes that none of the many specialists had ever alluded to the existence of this report. The court is thus unable to accept the defendant's suggestion that it was the plaintiff who has given the report to the specialists with whom he had consultations.

[67] No less interesting and certainly no less puzzling is how this report, unfavourable to the plaintiff, has ended up in the hands of the Dr How's solicitors before the hearing of the suit between the plaintiff and Dr How. It could not have been given by the plaintiff. The court finds that since it is the defendant who had suggested that the report had been handed over by the plaintiff to others, then the defendant should have called the solicitors from Messrs Joseph Ting & Co to enlighten the court and to unravel the puzzle as to where and from whom they had obtained the report. The defendant's failure to do so lends weight to the plaintiff's case.

[68] Another interesting point that has surfaced in this case is the

relationship between the defendant and Dr How. The defendant contends that he has no pecuniary interest in Dr How's case. However, during the course of the hearing, the court has heard about how DPL had asked the defendant to be an expert witness. He declined to do so. He did not inform the plaintiff that he had been approached by DPL. There is also the issue about Messrs Joseph Ting & Co, the solicitors for Dr How, having entered appearance for the defendant in this case. Although the defendant has given a long and involved explanation as to how DPL had appointed Messrs Joseph Ting & Co to represent him until he engaged new solicitors to take over, the fact remains that for a time, and they were on record as representing the defendant. There is thus a link, however tenuous, between Messrs Joseph Ting & Co, Dr How and the defendant.

CONCLUSION

[69] In conclusion, the court finds that the plaintiff has succeeded in proving that the he had a patient-doctor relationship with the defendant. The court is satisfied that in the course of his consultation with the defendant, the plaintiff would have revealed to the defendant confidential information about the dental work that had been done on him. The defendant would also have drawn his own conclusions and made his own findings as to the state of the plaintiff's oral health, including the nature, extent and seriousness of the plaintiff's pain and suffering. The court is satisfied that these are confidential matters which the doctor in the relationship owes to the patient to keep confidential.

[70] The court also finds that the defendant had indeed issued the dental report on the plaintiff. On the balance of probabilities, the court finds that the report was neither requested by the plaintiff nor was it ever handed over to the plaintiff. The court finds that the appearance of the report in the hands of Dr How's solicitors just before the trial without any plausible explanation as to how it came to be there would lead the court to the irresistible conclusion that it was the maker of the report who had given it to Messrs Joseph Ting & Co.

[71] In the circumstances, the court finds that the plaintiff has succeeded in proving its case against the defendant on a balance of probabilities. Accordingly, the court hereby allows the plaintiffs claim for declarations as in prayers (a) and (b). The defendant is ordered to pay to the plaintiff general damages of RM25,000 and interest at the rate of 4%pa from 11 March 2011 until full settlement. No exemplary or punitive damages ordered although the court would order the defendant to pay costs, such costs to be taxed unless otherwise agreed.

Plaintiff's claim allowed with costs.

Reported by Ashgar Ali Ali Mohamed